

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

BRYANT MOORE, JR., BY HIS NEXT)	
FRIEND AND FATHER, BRYANT MOORE,)	
SR.,)	
)	
PLAINTIFF/APPELLANT,)	Appeal No. ED82467
)	
v.)	
)	
BI-STATE DEVELOPMENT AGENCY,)	
)	
DEFENDANT/RESPONDENT.)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

THE HONORABLE JIMMIE M. EDWARDS
CIRCUIT JUDGE, DIVISION FIVE

BRIEF OF RESPONDENT
BI-STATE DEVELOPMENT AGENCY, INC.

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Abbreviations:

“L.F. I” Legal File in Appeal No. ED79994

“L.F. II” Legal File in Appeal No. ED82467

“RA” Respondent’s Appendix

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STATEMENT OF FACTS

Plaintiff asserts in his Statement of Facts that “the law of the case is that no notice of appeal was filed by plaintiff.” (Plaintiff’s Brief at 10.) In response to this misstatement and legal conclusion, Defendant Bi-State Development Agency submits its own statement of facts:

On April 27, 2001, the trial court entered judgment in Plaintiff’s favor and against Bi-State in the sum of \$3,952,500.00, after reducing the jury’s verdict of \$7,750,000 by Plaintiff’s comparative fault. (L.F. I 111-13.) Later, on May 9, 2001, the trial court reduced the judgment, by set off, to \$3,890,000.00. (L.F. I 131.)

From the trial court’s amended judgment, Bi-State appealed. Bi-State filed its Notice of Appeal on August 15, 2001. (L.F. I 205). This Court subsequently docketed Bi-State’s appeal as Appeal No. ED79994.

Plaintiff also filed an appeal from the trial court’s judgment. (L.F. I 220; L.F. II 98.) He did so on August 17, 2001, when he filed his Notice of Appeal. (L.F. II 98.)

On March 29, 2002, Plaintiff filed his brief in Appeal No. ED79994. (L.F. II 180.) His brief demonstrates he filed and prosecuted a cross-appeal. (L.F. II 181-86; RA2-8.)

Plaintiff argued the trial court erred in submitting his comparative fault to the jury. (L.F. II 181.) In support, he contended Bi-State failed to rebut the presumption under Illinois law that children between the ages of seven and

fourteen are not capable of contributory/comparative fault. (*Id.*) For relief, he sought reinstatement of the net verdict of \$7,687,500.00. (*Id.* at 186.)

After Plaintiff filed his brief, the Court issued on April 12, 2002, an Order to Show Cause, which directed Plaintiff to supplement the record on appeal with proof of payment of the docket fee for his Notice of Appeal and to show cause why his cross-appeal should not be dismissed for lack of jurisdiction. (L.F. II 227.) On April 17, 2002, Plaintiff filed his Response to the Court's Order, which he denominated: "Respondent/Cross-Appellant Bryant Moore, Jr.'s Response to Order to Show Cause." (*Id.* at 187; RA9-13.)

In his Response, Plaintiff maintained he had filed a proper cross-appeal, although he had failed to pay the requisite \$50.00 docket fee at the time he filed his Notice of Appeal. (L.F. II 187-91; RA9-13.) Plaintiff argued he did not have to pay the filing fee for his cross-appeal because Bi-State had already filed such a fee. (*Id.* at 187-90; RA9-12.)

Before the Court's Show Cause Order, Plaintiff also re-filed his Notice of Appeal in the trial court on April 4, 2002, and paid a \$50.00 filing fee. (L.F. II 162, 190; RA1.) His Notice of Appeal specifically identified Plaintiff as the "cross-appellant." (L.F. II 162; RA1.)

On April 19, 2002, the Court concluded Plaintiff's "failure to timely pay the docket fee with a notice of appeal is jurisdictional." (L.F. II 192, 229; RA14.) Therefore, as there was no proper cross-appeal before the Court, the Court

“decline[d] to consider the issue raised as a cross appeal in [Plaintiff’s] brief.”
(L.F. II 192, 229; RA14.)

On July 16, 2002, the Court handed down its decision in Appeal No. ED79994. (L.F. II 24.) The Court affirmed the trial court’s judgment and dismissed Plaintiff’s cross-appeal. (L.F. II 33-35.) As to Plaintiff’s cross-appeal, the Court ruled as follows:

Consequently, having not timely paid the docket fee with his notice of appeal, Moore did not file a valid notice of appeal. Our jurisdiction depends on the timely filing of a notice of appeal and lacking that our only permissible action is to dismiss the appeal. Accordingly, Moore’s point on cross-appeal is stricken from his brief, and his cross-appeal is dismissed for lack of jurisdiction for an untimely notice of appeal.

(*Id.* at 34-35.)

After Bi-State exhausted its post-opinion remedies in Appeal No. 79994, Bi-State paid Plaintiff the sum of \$3,890,000 on December 2, 2002. (L.F. II 158; Appellant’s Brief at 10.) This sum satisfied the judgment amount after reductions for Plaintiff’s comparative fault and the offset. In return, Plaintiff filed a Partial Satisfaction of Judgment. (L.F. II 153.) However, Plaintiff maintained Bi-State owed him post-judgment interest.

Therefore, Bi-State filed a Motion for Order of Complete Satisfaction of Judgment or, in the Alternative, to Amend the Judgment. (L.F. II 155.) Bi-State

argued where a judgment creditor, such as Plaintiff, is dissatisfied with the judgment and appeals on the ground of inadequacy from the recovery in his favor and the judgment is affirmed, the judgment creditor is not entitled to post-judgment interest on appeal. (L.F. II 158.) In opposition, Plaintiff filed a Motion for Order Compelling Defendant to Pay Interest. (L.F. II 73.)

On January 15, 2003, the trial court granted Bi-State's Motion and denied Plaintiff's Motion, holding that Bi-State had satisfied the judgment in Plaintiff's favor by its payment of \$3,890,000. (L.F. II 147-52.) The trial court explained, in part, that "a judgment creditor who appeals a judgment as inadequate is not entitled to interest pending the appeal, when the judgment is affirmed on appeal." (*Id.* at 150) (*citing Land Clearance for Redevelop. Auth. of Kansas City v. Kansas Univ. Endowment Ass'n*, 831 S.W.2d 649, 650 (Mo. App. W.D. 1992).

Plaintiff's appeal followed.

POINT RELIED ON

- I. The trial court did not err in granting Bi-State Development Agency's Motion for Order of Complete Satisfaction of Judgment upon its payment of the judgment in Plaintiff's favor without post-judgment interest, because Plaintiff was not entitled to post-judgment interest as a matter of law, in that Plaintiff, as a judgment creditor, appealed the judgment on the ground the judgment was inadequate and lost.

Investors Title Co. v. Chicago Title Ins. Co., 18 S.W.3d 70 (Mo. App. E.D. 2000)

Land Clearance for Redevelop. Auth. of Kansas City v. Kansas Univ. Endowment Ass'n, 831 S.W.2d 649 (Mo. App. W.D. 1992)

State ex rel. Southern Real Estate & Fin. Co. v. City of St. Louis, 115 S.W.2d 513 (Mo. App. E.D. 1938)

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ARGUMENT

I. The trial court did not err in granting Bi-State Development Agency's Motion for Order of Complete Satisfaction of Judgment upon its payment of the judgment in Plaintiff's favor without post-judgment interest, because Plaintiff was not entitled to post-judgment interest as a matter of law, in that Plaintiff, as a judgment creditor, appealed the judgment on the ground the judgment was inadequate and lost.

A. Introduction

The question presented by Plaintiff's appeal is whether the trial court erred as a matter of law in concluding that Bi-State had fully satisfied the underlying judgment when it paid Plaintiff the judgment without paying Plaintiff an additional sum for post-judgment interest. Plaintiff acknowledges the governing law in his brief. (Appellant's Brief at 17.) These authorities hold that a judgment creditor who appeals a judgment as inadequate is not entitled to interest pending the appeal, when the judgment is affirmed on appeal. *See, e.g., Land Clearance for Redevelop. Auth. of Kansas City v. Kansas Univ. Endowment Ass'n*, 831 S.W.2d 649, 650-51 (Mo. App. W.D. 1992).

Plaintiff seeks to escape these authorities by invoking the law of the case. (Appellant's Brief at 14-16, 17-22.) He argues that as this Court dismissed his cross-appeal on jurisdictional grounds, he did not bring a valid cross-appeal that would otherwise deprive him of the right to recover post-judgment interest. Plaintiff's argument should be denied.

Plaintiff filed a cross-appeal, briefed his cross-appeal on the merits, and argued in this Court that he had brought a proper cross-appeal. (L.F. II 162-79, 180-86, 187-91; RA1-14.) As Plaintiff filed and prosecuted an unsuccessful cross-appeal, the rule that bars an appellant the right to recover post-judgment interest governs this action. Therefore, the trial court's judgment for Bi-State on its Motion for Order of Complete Satisfaction of Judgment should be affirmed.

B. As a cross-appellant, Plaintiff is not entitled to post-judgment interest.

Plaintiff's unsuccessful cross-appeal bars Plaintiff from recovering post-judgment interest. Where a judgment creditor, such as Plaintiff, is dissatisfied with the judgment and appeals on the ground the judgment is inadequate and the judgment is affirmed, the judgment creditor is not entitled to post-judgment interest on appeal. *Investors Title Co. v. Chicago Title Ins. Co.*, 18 S.W.3d 70, 72 (Mo. App. E.D. 2000); *Jesser v. Mayfair Hotel, Inc.*, 360 S.W.2d 652, 665 (Mo. banc 1962); and *Komosa v. Monsanto Chemical Co.*, 317 S.W.2d 396, 398 (Mo. banc 1958). This rule is based on the appellant's own conduct, which delays and prolongs the proceedings and renders satisfaction of the judgment impossible. *Investors Title Co.*, 18 S.W.3d at 72; *Land Clearance for Redevelop. Auth. of Kansas City v. Kansas Univ. Endowment Ass'n*, 831 S.W.2d 649, 650 (Mo. App. W.D. 1992).

The fact the judgment debtor also appealed from the judgment does not militate against the rule barring the award of post-judgment interest. "The fact

that both parties appeal does not entitle the judgment creditor to claim interest pending appeal when the judgment creditor claims to have been aggrieved by the judgment.” *Land Clearance*, 831 S.W.2d at 650.

This rule applies to cross-appeals by the judgment creditor. *Investors Title Co.*, 18 S.W.3d at 73-74. The rule also applies whether the judgment creditor is the first or the last party to file an appeal from the underlying judgment. *Id.* at 73 n. 2; *State ex rel. Southern Real Estate & Fin. Co. v. City of St. Louis*, 115 S.W.2d 513, 516 (Mo. App. E.D. 1938).

Plaintiff’s cross-appeal falls squarely within the confines of this rule. Plaintiff’s appeal challenged the adequacy of the judgment entered in his favor. In his cross-appeal, he sought reinstatement of the net verdict of \$7,687,500.00, which the jury returned in his favor. (L.F. II 180-86; RA2-8.) Therefore, Plaintiff’s unsuccessful cross-appeal, which challenged the adequacy of the judgment, deprived Plaintiff of the right to recover post-judgment interest as a matter of law. As this Court held in *Investors Title Co.*, once Plaintiff filed his notice of cross-appeal, he “forfeited the right to claim post-judgment interest.” 18 S.W.3d at 74.

C. The law of the case does not compel a contrary conclusion.

Plaintiff invites the Court to apply the law of the case to reverse the trial court’s judgment for Bi-State on his claim for post-judgment interest. (Appellant’s Brief at 16-22.) Plaintiff argues that as the Court held in the first appeal that he had failed to file a valid notice of appeal, the law of the case

establishes that he did not file a cross-appeal and, therefore, he did not forfeit his right to post-judgment interest. (Appellant's Brief at 17.) Plaintiff's argument should be denied.

The law of the case has no application. The doctrine applies appellate decisions to later proceedings in the same case and governs successive appeals involving substantially the same issues and facts. *Williams v. Kimes*, 25 S.W.3d 150, 153 (Mo. banc 2000). The doctrine applies to all points presented and decided as well as all matters that arose before the first appeal and might have been raised but were not. *Id.* at 154; *Davis v. General Elec. Co.*, 991 S.W.2d 699, 703 (Mo. App. S.D. 1999).

The Court in Appeal No. ED79994 did not consider whether Plaintiff was entitled to post-judgment interest. The trial court rightly observed the Court "did not address Plaintiff's entitlement to post-judgment interest." (L.F. II 151.) The parties' briefs and the Court's decision in Appeal No. ED79994 are silent on the issue. Therefore, there is no law of the case governing Plaintiff's claim for post-judgment interest. Indeed, the issue was not raised until Bi-State filed its Motion for Order of Complete Satisfaction of Judgment after Plaintiff declined to give Bi-State a full satisfaction of judgment upon its payment of \$3,890,000 to Plaintiff. (L.F. II 155.)

Moreover, the law of the case actually supports the trial court's judgment for Bi-State. The Court's decision can be read only one way. Plaintiff filed a cross-appeal, albeit an unsuccessful one on jurisdictional grounds. (L.F. II 33.)

His brief filed in Appeal No. ED79994 also demonstrates he sought to prosecute an appeal on the basis the underlying judgment was inadequate because it had been reduced by his comparative fault. (L.F. II 181-86; RA2-8.)

The fact Plaintiff's cross-appeal was dismissed on jurisdictional grounds does not call for a different conclusion. Regardless of the basis for the adverse disposition of his appeal, Plaintiff filed a cross-appeal, briefed his cross-appeal on the merits, and at all relevant times maintained in this Court during Appeal No. ED79994 that he had brought a proper cross-appeal. (L.F. 162-79, 180-86, 187-91; RA1-14.) Plaintiff cannot ignore the substance of his cross-appeal challenging the adequacy of the judgment entered in his favor.

That Plaintiff's notice of appeal was invalid for jurisdictional purposes does not nullify the fact of his cross-appeal, much less render his cross-appeal no appeal at all. The disposition of his cross-appeal on procedural grounds is no less an adverse disposition than one on the merits would have been, or in any other appeal in which the appellant failed to preserve its points for appellate consideration. Regardless of its procedural defects, Plaintiff's cross-appeal was an appeal. It cannot be classified in any other way.

Moreover, contrary to Plaintiff's contentions, Bi-State did not argue in the trial court the opposite of what it argued in Appeal No. ED79994. (Appellant's Brief at 19.) Plaintiff mischaracterizes Bi-State's argument. In response to Plaintiff's cross-appeal, Bi-State raised two arguments. First, Bi-State argued, consistent with the Court's Orders of April 12, 2002, and April 19, 2002, (L.F. II

227-29), that Plaintiff's cross-appeal should be dismissed because Plaintiff had failed to perfect his appeal by not paying the required docket fee at the time he filed his original Notice of Appeal. Second, Bi-State addressed Plaintiff's cross-appeal on the merits. (*See* Bi-State's Second Brief in Appeal No. ED79994 at 19-21.) However, despite Plaintiff's present contention, Bi-State did not argue in this Court that Plaintiff had never filed a cross-appeal in the first instance.

Finally, Plaintiff's argument that the trial court should have applied the law of the case to avoid the forfeiture of his right to post-judgment interest is without merit. (Appellant's Brief at 22.) As noted above, the law of the case has no application. Plaintiff's argument ignores the substance of his own actions.

Plaintiff affirmatively acted, albeit unsuccessfully, to bring an appeal on the ground the trial court's judgment in his favor was inadequate. Plaintiff's action made immediate satisfaction of the judgment against Bi-State impossible. At no time before this Court's adverse decision in Appeal No. ED79994 did Plaintiff manifest an intent to abandon his cross-appeal. Instead, he vigorously maintained the propriety of his actions and the validity of his appeal. (L.F. II 187-91; RA9-13.) From the time he filed his original Notice of Appeal, Plaintiff maintained in a cross-appeal – which he briefed on the merits – that he was aggrieved by the trial court's refusal to reinstate the net verdict returned in his favor. Therefore, despite Plaintiff's present arguments concerning the validity of his appeal, Bi-State could not have satisfied the judgment until the Court disposed of Plaintiff's appeal on whatever ground, whether for jurisdictional reasons or on the merits.

This Court's decision in *Investors Title Co.* permits no other conclusion. "Regardless of [Bi-State's] own appeal, [Bi-State] could not have satisfied the judgment against [it] so long as Plaintiff's appeal was pending." 18 S.W.3d at 74. Therefore, the trial court's judgment for Bi-State on the subject of post-judgment interest should be affirmed. As a matter of law, Plaintiff, as Bi-State's judgment creditor is not entitled to post-judgment interest because he unsuccessfully appealed the amount of the judgment entered in his favor. *Land Clearance*, 831 S.W.2d at 650-51.

CONCLUSION

Defendant Bi-State Development Agency respectfully requests the Court to affirm the trial court's judgment entered in accordance with its order sustaining Bi-State's Motion for Order of Complete Satisfaction of Judgment and denying Plaintiff's Motion for Order Compelling Bi-State to Pay Interest.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

The undersigned certifies that a copy of Respondent's Brief and a disk containing same were deposited on this 24th day of June, 2003, in the United States Mail, postage prepaid, addressed to: Mr. Richard E. Banks, Banks & Associates, P.C., Attorneys for Plaintiffs, 8000 Maryland Avenue, Suite 1260, St. Louis, Missouri 63105; and to Mr. Jeffrey P. Gault and Mr. John D. Warner, Jr., Gault & Warner, LLC, Co-Counsel for Plaintiffs, 222 S. Central, Suite 500, Clayton, Missouri 63105.

T. Michael Ward #32816

Subscribed and sworn to before me this 24th day of June, 2003.

Notary Public

My Commission Expires:

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Respondent's Brief complies with the limitations of Eastern District Rule 360, contains 2,635 words, and that the computer disk filed with Respondent's Brief under Rule 84.06 and Eastern District Rule 361 has been scanned for viruses and is virus-free.

T. Michael Ward #32816

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